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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

IN RE THE COMMITMENT OF EUGENE LEE CLAY,	2 CA-MH 2009-0001-SP DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. A-20070019

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

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B R A M M E R, Judge.

¶1 In November 2008, a jury found appellant Eugene Lee Clay to be a sexually violent person as defined in A.R.S. § 36-3701(7) of Arizona's Sexually Violent Persons (SVP) Act, A.R.S. §§ 36-3701 through 36-3717. The trial court subsequently committed Clay to the custody of the Arizona Department of Health Services for placement in a licensed facility under the supervision of the superintendent of the Arizona State Hospital. In this appeal, he challenges the court's denial of his motion for a mistrial, arguing the prosecutor had misstated the state's burden of proof during closing argument. We affirm for the reasons stated below.

¶2 The decision to order a mistrial is within the sound discretion of the trial court, the exercise of which we will not disturb on appeal absent clear abuse. *See State v. Adamson*, 136 Ariz. 250, 260, 665 P.2d 972, 982 (1983), *citing State v. Trotter*, 110 Ariz. 61, 65, 514 P.3d 1249, 1253 (1973); *State v. Merryman*, 79 Ariz. 73, 74-75, 283 P.2d 239, 241 (1955). In assessing whether the trial court abused its discretion here, we must first determine whether the prosecutor's statements "transgress[ed] the boundaries of permissible argument." *State v. King*, 110 Ariz. 36, 42-43, 514 P.2d 1032, 1038-39 (1973). Although prosecutors are accorded wide latitude during closing argument, *see State v. Herrera*, 174 Ariz. 387, 396, 850 P.2d 100, 109 (1993), it is improper for them to misstate the law, *State v. Means*, 115 Ariz. 502, 505, 566 P.2d 303, 306 (1977), or make remarks designed to "inflame the minds of jurors with passion or prejudice or influence the verdict in any degree." *Merryman*, 79 Ariz. at 75, 283 P.2d at 241. Even if an argument transgresses permissible boundaries, however, reversal is not warranted unless

the argument was "so unduly prejudicial as to have amounted to a denial of a fair trial." *King*, 110 Ariz. at 42-43, 514 P.2d at 1038-39. The argument must have been "likely to have influenced the jury in reaching a verdict." *Id.* at 43, 514 P.2d at 1039.

¶3 Under the SVP Act, the state has the burden of proving beyond a reasonable doubt that the person named in the petition is sexually violent. *See* § 36-3707(A). A sexually violent person includes one who has been convicted of a sexually violent offense and exhibits "a mental disorder that makes the person likely to engage in acts of sexual violence." § 36-3701(7). When a statutory term's meaning is unclear, "we ordinarily interpret the statute in such a way as to achieve the general legislative goals that can be adduced from the body of legislation in question." *Dietz v. Gen. Elec. Co.*, 169 Ariz. 505, 510, 821 P.2d 166, 171 (1991). The term "likely," as used throughout the Act, is not defined in the Act itself, but has been held "to require a standard somewhat higher than 'probable.'" *In re Leon G.*, 204 Ariz. 15, ¶¶ 25-27, 59 P.3d 779, 786-87 (2002). Thus, the state must prove beyond a reasonable doubt that a person's "mental disorder makes it highly probable that the person will engage in acts of sexual violence." *Id.* ¶ 28 (emphasis removed).

¶4 Here, it was undisputed at Clay's civil commitment trial that he had been convicted of a sexually violent offense and that he suffered from schizophrenia, disorganized type. The relevant question thus was whether his schizophrenia made it highly probable he would commit another sexual offense.

¶5 In 1994, Clay was convicted of sexual conduct with a minor under the age of fourteen after he molested a five-year-old girl in a park restroom. He had dressed in many layers of women's clothing and went into the women's bathroom. When the victim ran out of toilet paper, Clay reported that he had heard "a woman . . . saying things about sex with a little girl . . . [that Clay] should eat her pussy to make her happy," so Clay told the victim he would have to "lick her clean." Clay waived his right to a jury trial and the trial court sentenced him to an aggravated term of fifteen years' imprisonment.

¶6 At Clay's civil commitment trial in 2008, psychologists Dr. Jerry Day and Dr. Sergio Martinez both testified they had concluded Clay was highly probable to commit another sexual offense. Day, who had been engaged by the court to evaluate Clay, testified that he had evaluated Clay, in part, by using psychological assessment tools designed to assess an offender's likelihood to reoffend sexually. The results of four tools he used indicated Clay was at moderate risk to commit another sexual offense, although one other result indicated he was at low to moderate risk. Martinez, who evaluated Clay on behalf of the Department of Corrections, also used a tool designed to assess Clay's likelihood to commit another sexual offense. He testified that the results of this tool, which was different from any used by Day, assessed Clay as moderate to high risk of reoffending sexually. Both Day and Martinez further testified that a tool they both had used, one designed to assess psychopathy, a disorder linked to recidivism generally, assessed Clay as low risk to reoffend. Although none of the assessment tools evaluated Clay as high risk to reoffend, Day and Martinez both concluded that, nonetheless, based

on their personal observations and assessments of him, it was highly probable Clay would commit another sexual offense.

¶7 During closing argument, Clay argued that because none of the assessment tools indicated he was at high risk to reoffend, there was reasonable doubt whether he was likely to reoffend, as the state was required to demonstrate under the SVP Act. In rebuttal, the prosecutor argued, over Clay's objection, that the legislature had not defined "highly probable" in the SVP Act, nor associated it with any percentage of likelihood. Rather, she posited, "the question becomes[,] what does 'highly probable mean to you [the jury]?'" To illustrate her point, the prosecutor suggested that a twenty or thirty percent likelihood could constitute "highly probable," depending on the context. She stated:

> [L]et's take an example. Let's say you're watching the weather report for tomorrow and it says there's a 20 percent chance of rain tomorrow. And you think to yourself, okay, so am I going to bring my umbrella tomorrow when I head out? Well, I guess that depends on a couple factors. One, where are you going? Two, whereabouts in Tucson do you live? Three, what are you going to do? Are you going to go hiking? Are you going to go up to the mountains or are you going to be somewhere down here?
>
> But if you were told that tomorrow you needed to board an airplane and that airplane has a 30 percent chance of crashing into the ground, is that highly probable to you? Statistics and percentages are only as relevant or as appropriate, depending upon the context in which they are used.

¶8 Clay objected to this line of argument, asserting it "suggested to the jury, among other things, that it is okay [for them to reach a] conclusion that a 30 percent possibility satisfies the legal requirement of 'high probability.'" He elaborated that high probability was "clearly more than 50 percent. That's the difference between clear and convincing evidence and preponderance of the evidence." On this basis, he moved for a mistrial. In denying the motion for mistrial, the trial court noted a lack of appellate guidance and stated "everybody always says preponderance of the evidence, well if one side has 51 percent and the other has 49, you win. Clear and convincing is more than that, beyond a reasonable doubt is even more than that. And that's probably all correct, but it really isn't defined."

¶9 Clay argues now, as he did below, that the prosecutor misstated the law under the SVP Act, which requires the state to prove beyond a reasonable doubt that a person's mental disorder makes it likely, or highly probable, that he or she will commit a sexually violent act. *See Leon G.*, 204 Ariz. 15, ¶ 28, 59 P.3d at 787. He supports this assertion by citing *State v. Roque*, 213 Ariz. 193, ¶ 75, 141 P.3d 368, 390 (2006), in which our supreme court stated that "the definition of 'clear and convincing' . . . requires the jury to 'be persuaded that the truth of the contention is highly probable,'" *quoting In re Neville*, 147 Ariz. 106, 111, 708 P.2d 1297, 1302 (1985). He also cites *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 25, 110 P.3d 1013, 1019-20 (2005), in which the court clarified that the clear and convincing evidence standard demands proof by more than a preponderance of the evidence, which in turn "requires that the fact-finder determine

whether a fact sought to be proved is more probable than not." Thus, Clay concludes "the applicable case law makes it abundantly clear that the [highly probable] standard is the same as clear and convincing, and that is a number greater than 51% . . . ." We need not address what specific percentage of likelihood or probability the legislature intended when drafting the SVP Act because we conclude the prosecutor's closing argument improperly invited the jurors to engage in a balancing test in assessing probability.

¶10 A closer examination of the prosecutor's argument is instructive. The prosecutor first asked the jurors whether they would bring an umbrella if there were a twenty percent chance of rain. She suggested that if a juror's activities that day made the need for an umbrella great, then the juror could consider the chances of rain were highly probable. But, the need for an umbrella does not change the probability of rain. Rather, it only affects the assessment of whether, in light of the probability of rain, it is reasonable to forego an umbrella.

¶11 The prosecutor next asked the jurors whether they would board a plane knowing it had a thirty percent chance of crashing, and similarly suggested a crash was highly probable to them if they would not. But, no reasonable person would board a plane with even a slight, but legitimate, risk of crashing, because plane crashes result in casualties and serious damage. The illogic in the prosecutor's rhetorical device is thus clear. The unwillingness to accept even a minimal risk with serious implications does not affect the likelihood the risk will occur.

¶12 The prosecutor's argument emphasized that in determining whether to pursue a specific course of action, people engage in a cost-benefit analysis of risk versus consequence. The SVP Act, however, does not define the state's burden in terms of a balancing test. Rather, it requires the state to demonstrate that Clay is highly probable to reoffend. A balancing test lessens the state's burden because it would permit a de minimis risk of enormous consequence to meet the standard of highly probable.

¶13 The prosecutor's argument that probability is contextual invited the jurors to consider the damage that would result if Clay were to molest another child, and to assess his likelihood of reoffending in light of that damage. Put another way, she invited the jurors to consider it more likely that Clay would commit another sexual offense because the consequences of that offense would be great. Thus, the prosecutor's argument mischaracterized the law and invited the jury to base its decision, at least in part, on passion or prejudice. *See Means*, 115 Ariz. at 505, 566 P.2d at 306; *Merryman*, 79 Ariz. at 75, 283 P.2d at 241.

¶14 Although the prosecutor's argument was improper, we conclude the trial court did not abuse its discretion in denying Clay's motion for a mistrial because the argument was not likely to have influenced the jury in reaching its verdict, and thus was not "so unduly prejudicial as to have amounted to a denial of a fair trial." *King*, 110 Ariz. at 43, 514 P.2d at 1039. The argument was not likely to have influenced the jury in reaching its verdict because there was overwhelming evidence that Clay would reoffend.

See State v. Marvin, 124 Ariz. 555, 557, 606 P.2d 406, 408 (1980) (reversal not mandated where argument improper but evidence of guilt overwhelming).

¶15 Day diagnosed Clay with paraphilia, a sexual diagnosis characterized by "persistent continuous urges and fantasies concerning sexually violating or taking advantage of [non-consenting] individuals" Both Day and Martinez further diagnosed Clay with pedophilia, a sexual diagnoses that is a subset of paraphilia and characterized by a focus on children.

¶16 Martinez had evaluated Clay in July 2007, just before his civil commitment trial. At that time, Clay "express[ed] a desire to engage in sexual activities with girls as young as four or five." Clay also indicated that he found nothing wrong with his desire. Similarly, Day testified that when he evaluated Clay in November 2007, Clay had no remorse about having molested a five-year-old child, the conduct that resulted in his 1994 conviction. Rather, he said he regretted that "he didn't give the little girl $20," and that "the only thing he would do differently, would be [to] take her to his house and [molest her there]." When describing the offense, Clay said, "We were playing around. We were both drunk and got hot. We wanted to make love." Clay also stated "he would do it again" because "[h]e was just playing around" and "he would like to marry a girl in the five- to ten-year old range." Clay, shortly before he was evaluated by Day, put a picture of a twelve-year-old girl on the wall of his room, telling people she was his wife and she was fifty-two years old.

¶17 Although the assessment tools Martinez used did not evaluate Clay as high risk to commit another sexual offense, Martinez testified that such tools "can only go so far," and that psychologists are "not to rely just solely on any one instrument," but are "to rely on as much information as [is] available." In fact, Martinez agreed that "low scores are far less interpretable [than high scores] and cannot be assumed to represent a low risk for reoffending." He stated the fact that Clay continued to express an interest in molesting young girls, "cannot be put aside and ignored."[1] Clay expressed he "would have sex with [four year old girls], lick them and masturbate." Clay justified his interest in part by suggesting that four-year-old girls would "like it" for him to perform oral sex on them because "they won't get pregnant and worry about the hospital and having babies." Although Martinez also stated he did not believe everything Clay told him, including Clay's statements that he was a millionaire and needed Central Intelligence Agency (CIA) protection, he clearly found Clay's expressed sexual interest in children to be credible. Notably, Clay had stated "I've had ten little girls mouth, oral sex, doggie style, people I d[on]'t know." Like Martinez, Day also took a holistic approach to evaluating Clay. Day agreed that an "actuarial prediction can outperform [purely]

[1]Martinez also testified that, in his opinion of what highly probable meant, an offender could be highly probable to reoffend even if actuarial numbers indicated a less than fifty percent likelihood of reoffense. Clay moved to strike this testimony, arguing that Martinez was using an improper legal standard for highly probable. The trial court denied Clay's motion. Martinez later explained that, although the tools he used indicated Clay was at less than a fifty percent likelihood to reoffend, in his clinical assessment and attendant opinion, they did not gauge fairly Clay's risk.

clinical prediction," but explained that he reached his conclusion that Clay was highly probable to reoffend on both actuarial and clinical grounds.

¶18 Both Martinez and Day agreed that a person's likelihood to reoffend drops linearly after age fifty and is around 3.8 percent at age sixty. But they also explained that a person's likelihood to reoffend decreases with age, in part, because individuals tend to gain self-control as they mature. Martinez stated, however, that Clay "has serious difficulties in controlling his behavior." Day similarly noted Clay's impulsivity and pointed out that despite having been informed of the nature of the interview, Clay "c[ould not] stop telling [Day] that he would [molest another child] again or that he was just sexing around." Both psychologists also found Clay's extensive criminal history, albeit for non-sexual offenses, illustrative of his impulsive tendencies and likelihood to reoffend. They further noted that Clay needed medication—which he was opposed to taking and did not believe he needed—because, as Day explained, Clay suffered from "persistent delusions, persistent hallucinations, persistent auditory hallucinations, persistent disorganization, [and] persistent lack of self control."

¶19 In light of this overwhelming evidence, no reasonable jury could fail to find beyond a reasonable doubt that Clay was highly probable to reoffend. Accordingly, the trial court did not err in denying Clay's motion for mistrial despite the prosecutor's improper argument. Further, the court correctly instructed the jurors that "the State[] must prove beyond a reasonable doubt that [Clay] has a mental disorder that makes it highly probable that he will engage in future acts of sexual violence." It further

instructed them that "[p]roof beyond a reasonable doubt is proof that leaves you firmly convinced that the respondent is a sexually violent person." We presume the jurors followed the court's instructions. *See State v. Moody*, 208 Ariz. 424, ¶ 208, 94 P.3d 1119, 1164 (2004). We thus affirm the court's order adjudicating Clay a sexually violent person and committing him to the custody of the Arizona Department of Health Services.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge